New York State Defenders Association
Immigrant Defense Project

25 Chapel Street, Suite 703, Brooklyn, NY 11201 ♦ Phone 718-858-9658 ext. 201 ♦ Fax 800-391-5713 ♦ www.immigrantdefenseproject.org

January 23, 2007

The Honorable Guido Calabresi
The Honorable Amalya L. Kearse
The Honorable Pierre N. Leval

Re: Martinez v. Ridge, No. 05-3189-ag

Dear Judges Calabresi, Kearse and Leval:

We filed a motion to appear as amicus curiae in the above-referenced case, along with a proposed amicus curiae brief, on October 13, 2005. By order dated October 24, 2005, our motion was referred to this panel. On May 19, 2006, the day after the oral argument in this case, we submitted a letter to the panel requesting that the Court rule on our motion in order to allow the Court to consider our initial amicus brief as well as additional information provided in the letter addressing some of the issues raised at oral argument. Following the Supreme Court's decision in Lopez v. Gonzales, 549 U.S. ____, 127 S. Ct. 625, 2006 U.S. LEXIS 9442 (December 5, 2006), the panel requested that the parties submit letter briefs addressing the impact of Lopez on the petitioner's case. We now submit this proposed letter brief of amicus curiae to assist the Court in assessing the impact of the Supreme Court's decision on the resolution of the important issues raised in this case.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In Lopez, the United States Supreme Court held that a state drug offense constitutes a drug trafficking aggravated felony as a "felony punishable under the Controlled Substances Act" under the Immigration and Nationality Act ("INA") § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), "only if it proscribes conduct actually punishable as a felony under that federal law." Lopez, 127 S. Ct. at 633 (emphasis added). The Supreme Court's analysis in Lopez confirms the correctness of holdings of the First and Third Circuits that a state drug misdemeanor covering nontrafficking conduct – such as the offense at issue in this case – is not converted into an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) simply because of facts outside of the record of conviction regarding a prior drug conviction. See Berhe v. Gonzales, 464 F.3d 74, 85-86 (1st Cir. 2006); Steele v. Blackman, 236 F.3d 130, 137-38 (3rd Cir. 2001) (relating to the same New York misdemeanor at issue in this case). Under the federal Controlled Substances Act, a misdemeanor possession offense is converted by sentence enhancement into a felony only if the U.S. Attorney has filed an information with the sentencing court charging the prior drug conviction and enabling the defendant to challenge the fact, finality, and validity of such prior conviction in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. See 21 U.S.C. §§ 844(a) and 851. Therefore, under the strict federal felony approach adopted in Lopez, a second or subsequent state drug possession or

nontrafficking conviction does not constitute an "aggravated felony" in the absence of such notice and proof of the fact, finality, and validity of any alleged prior drug conviction in the criminal proceeding. See infra Point I.

This conclusion that a second or subsequent state drug possession offense may not automatically be deemed an aggravated felony is further supported by the fact that federal prosecutors rarely seek to apply the recidivist enhancement in cases involving only federal misdemeanor possession offenses, and that, therefore, most federal second or subsequent drug possession offenses are not actually prosecuted as felonies under federal law. Indeed, the government's position in this case that any state second or subsequent possession offense may be deemed an aggravated felony simply based on facts outside the record of conviction regarding a prior drug conviction would necessarily lead to a conclusion that any such second or subsequent federal offense also must be deemed an aggravated felony even if the offense was not actually prosecuted as a felony by federal prosecutors – a result clearly in conflict with the holding of Lopez. See infra Point II.

The conclusion that second or subsequent state drug possession offenses may not be deemed aggravated felonies is particularly strong where the conviction at issue, as well as the past conviction(s), have been prosecuted as misdemeanors or even lesser offenses, as in this case. This is because such prosecutions involve summary procedures that not only raise questions regarding the fairness of treating the state conviction at issue as the equivalent of a federal felony, but also raise heightened concerns regarding the potential invalidity of the prior conviction(s) that the petitioner never had the opportunity to challenge as he or she would have had under federal law. See infra Point III.

Finally, should the Court find that it is not clear that Congress intended that second or subsequent state possession offenses be deemed aggravated felonies only when the state conviction involved the same notice and proof of the prior conviction(s) as required by the corresponding federal felony, the Court should apply the rule of lenity to conclude that the misdemeanor possession conviction at issue here does not constitute an illicit trafficking aggravated felony. See infra Point IV.

STATEMENT OF INTEREST

Please see our statement of interest in our initial amicus brief. See Brief of *Amicus Curiae* New York State Defenders Association in Support of Petitioner and in Support of Reversal (hereinafter "NYSDA Amicus Brief"), filed October 13, 2005, at 3-4.

BACKGROUND

This case is only one of many before the Board of Immigration Appeals ("BIA"), this Court and other federal circuit courts around the country in which the government is arguing that any state drug possession offense where facts outside the record of conviction indicate a prior drug offense should be treated as the equivalent of a successfully prosecuted federal recidivist felony. In many of these immigration cases, the government has treated such offenses as serious federal recidivist felonies even where the state court disposed of the case as a minor

misdemeanor with little or no jail time, or even where the state court entered a non-criminal disposition such as a New York "violation." See, e.g., In re: Augustus Denzil Stewart, 2004 WL 848506 (BIA March 1, 2004) (Connecticut marihuana misdemeanor with suspended prison sentence); In re: Conrad O'Neil Minto, 2005 WL 1104172 (BIA March 21, 2005) (New York marihuana non-criminal violation).

The government's argument thus attaches drastic "aggravated felony" immigration consequences to drug possession offenses that may have been given only perfunctory adjudication as misdemeanors or non-criminal dispositions in the state criminal context. For example, based on two misdemeanor convictions for the possession of marihuana in Vermont in 1986 and Connecticut in 2003, the BIA declared Augustus Denzil Stewart (2d Cir. Dkt No. 04-1546-ag) to be an aggravated felon. Mr. Stewart had been sentenced to three days for the Vermont conviction and two years probation with a suspended 360 days sentence for the Connecticut conviction. The government has even successfully argued to the BIA that two violations for possession of marihuana, which are not even regarded as crimes but as mere petty offense violations under NYPL § 221.05, constitute an aggravated felony. For his two marihuana possession violations under this statute, one of which was penalized with only a $50 fine and a conditional discharge, Conrad O'Neil Minto (2d Cir. Dkt No. 05-0007-ag) was declared an aggravated felon and became ineligible for discretionary relief from removal.

In some of the cases currently pending before this Court and elsewhere, an immigration judge ("IJ") had initially granted the petitioner "cancellation of removal" based on the equities of his or her case, but the BIA then reversed the grant of cancellation based solely on the government's argument that a second possession offense is automatically an aggravated felony and thus a bar to cancellation. For example, in the case of Donald Overton Powell (2d Cir. Dkt. No. 06-5315-ag), an IJ found Mr. Powell's equities "to far outweigh the adverse factors of his possessory criminal offense," a misdemeanor drug possession conviction. Decision of IJ Brennan, A17 560 142 (October 29, 2004) at 10. Mr. Powell has lived in the United States for nearly forty years and is a caretaker for his U.S. citizen granddaughters. Nevertheless, because of facts outside the record of conviction indicating that the conviction was preceded several years earlier by a prior misdemeanor possession offense, the BIA reversed the immigration judge and declared Mr. Powell an aggravated felon subject to mandatory deportation.

The broad reach of the government's position in these cases is particularly troubling given how common misdemeanor drug possession arrests are and the relatively rapid processes that state courts use to dispose of them. In 2005, for example, there were 81,949 misdemeanor drug arrests in New York State. See N.Y. State Div. of Criminal Justice Servs., ADULT ARRESTS: NEW YORK STATE BY COUNTY AND REGION 2005, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year2005.htm (last modified January 26, 2006). In comparison, in the same year, New York saw only half as many felony drug arrests. Id. These misdemeanor cases are processed quickly and without many of the procedural safeguards afforded to felony cases. Most misdemeanants are arraigned, plead guilty and are sentenced all on the same day. See N.Y. State Bar Ass'n, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17-18 (2001). Furthermore, every New York Criminal Court Judge in New York City handles, on average, more than 5000 cases per year, meaning that judges can often only spend minutes per case. See Daniel Wise, Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics

Investigation, N.Y.L.J., May 22, 2000, at 1. Many New York misdemeanor cases outside of New York City are heard by town or village justices, seventy-five percent of whom are not lawyers. See William Glaberson, Broken Bench: In Tiny Courts of New York, Abuses of Law and Power, N.Y. TIMES, September 25, 2006, at 1; see also New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm. In many of these town and village courts, the denial of defendants' right to counsel is widespread. See N.Y. State Comm'n on the Future of Indigent Def. Servs., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 18, 2006), at 21-23.

New York violation dispositions are even less significant under state law – New York defines violations to be in the same category as traffic infractions. NYCPL § 1.20(39) ("'petty offense' means a violation or a traffic infraction"). Violations are punishable by a maximum term of imprisonment of only fifteen days, and constitute a category of offense distinct from misdemeanors and felonies. NYPL §§ 10.00(3)-(5). The maximum fine for a violation is $250. NYPL § 80.05(4). A violation is not regarded as a "crime." NYPL § 10.00(6) (defining a "crime" as a "misdemeanor or a felony"). New York statutory law extends the right to counsel to violations that carry the possibility of imprisonment, NYCPL § 170.10(3)(c), but, as with misdemeanor charges, this right is routinely ignored in many town and village courts. See N.Y. State Comm'n on the Future of Indigent Def. Servs. at 21-23.

Within this context, those convicted of violations and misdemeanors not only receive less process than their felony counterparts, but they also may be suffering from procedural deficiencies that would, upon challenge, invalidate their convictions. This Court now has the opportunity to consider whether such offenses can be treated automatically as the equivalent of federal felony recidivist possession and therefore aggravated felonies. This decision will thus have far-reaching effects on many individuals with low-level misdemeanor convictions or even lesser offenses.

ARGUMENT

I. UNDER THE FEDERAL FELONY APPROACH ADOPTED BY THE SUPREME COURT IN LOPEZ, A STATE DRUG POSSESSION OR OTHER NONTRAFFICKING CONVICTION IS NOT AUTOMATICALLY CONVERTED INTO A "DRUG TRAFFICKING" AGGRAVATED FELONY SIMPLY BECAUSE OF FACTS OUTSIDE THE RECORD OF CONVICTION REGARDING A PRIOR DRUG CONVICTION.

The government's position that a drug possession conviction is automatically converted into a "drug trafficking" aggravated felony simply because of facts outside the record of conviction regarding a prior drug conviction is contrary to the express reasoning of the Supreme Court in the Lopez decision in two ways. First, it is contrary to the Supreme Court's admonition that the "drug trafficking" label should generally comport with the plain meaning of "illicit trafficking" in 8 U.S.C. § 1101(a)(43)(B). Second, the government's approach runs afoul of the Supreme Court's strict federal felony approach, which requires an inquiry into whether the actual state offense at issue is punishable as a felony under federal law, not an inquiry into what charges federal prosecutors might have been able to file against the defendant based on the underlying

facts. Indeed, the government's reasoning is contrary to the Second Circuit's categorical analysis of "aggravated felonies" and has been rejected by the circuit courts that have most carefully applied the federal felony approach – now adopted by the Supreme Court – in the multiple possession context. Under Lopez, a second or subsequent state drug possession or other nontrafficking offense cannot be not automatically considered a "drug trafficking" aggravated felony.

A. The government's position that a drug possession conviction is automatically converted into a "drug trafficking" aggravated felony simply based on facts outside the record of conviction regarding a prior drug conviction is contrary to the Supreme Court's admonition that the "drug trafficking" label should generally comport with the plain meaning of "illicit trafficking" in 8 U.S.C. § 1101(a)(43)(B).

In Lopez, the Supreme Court emphasized the problems inherent in identifying drug possession offenses as "trafficking," since the plain and commonsense meaning of "trafficking" does not support such a reading. See Lopez, 127 S. Ct. at 629-30 ("There are a few things wrong with [the argument that state drug possession offenses are aggravated felonies], the first being its incoherence with any commonsense conception of 'illicit trafficking,' the term ultimately being defined."). The Supreme Court noted that "ordinarily 'trafficking' means some sort of commercial dealing," id. at 630, a definition at odds with the elements of possession and other noncommercial drug offenses. As the Court explained, "the everyday understanding of 'trafficking' should count for a lot [when interpreting 8 U.S.C. § 1101(a)(43)(B)], for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant." Id. The Court noted that Congress can define "illicit trafficking" in an unorthodox or unexpected way, but refused to accept such an interpretation unless Congress clearly expressed such intent. Id. at 630 & n.6. Thus, while acknowledging that Congress did counterintuitively define "illicit trafficking" to include some possession offenses, the Court stated that "this coerced inclusion of a few possession offenses in the definition of 'illicit trafficking' does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning." Id. at 630 n.6.

This strict and narrow approach to determining what nontrafficking offenses may be deemed "drug trafficking" aggravated felonies is applicable to this case as well. The state offense at issue, criminal sale of marihuana in the fourth degree under New York law, is a state misdemeanor that punishes giving or offering a small amount of marihuana to another person for no remuneration. See NYPL § 221.40; see also NYSDA Amicus Brief at 4-7. It punishes conduct that is treated as simple possession under federal law. See 21 U.S.C. § 841(b)(4) (specifying that "distributing a small amount of marihuana for no remuneration" shall be treated as a possession offense under 21 U.S.C. § 844). No finding of a "commercial dealing" is required to sustain a conviction under this provision. See People v. Sterling, 650 N.E.2d 387, 398 (N.Y. 1995) (holding that the definition of "sell" in New York Penal Law extends "well beyond the ordinary meaning of the term and conspicuously excludes any requirement that the transfer be commercial in nature or conducted for a particular type of benefit or underlying purposes"). Thus, including this conviction within the label of a drug trafficking crime suffers from the same "incoherence with any commonsense conception of 'illicit trafficking'" as in the case of simple drug possession. Lopez, 127 S. Ct. at 629.

The fact that the possession or nontrafficking conviction in this case was preceded by a prior conviction – also of a nontrafficking offense – does not change this conclusion. The Supreme Court noted, in dicta, that Congress "counterintuitively" included some possession offenses as felonies in the Controlled Substances Act, including recidivist possession under 21 U.S.C. § 844(a). Id. at 630 n.6. However, as discussed below, having a possession conviction where facts outside of the record of conviction indicate that the individual has a prior possession conviction is not the same as having a conviction for recidivist possession under 21 U.S.C. § 844(a). See infra Point I.B. Like the difference between a conviction for possession and a conviction for possession with intent to distribute, the underlying facts may be the same but the conviction and the proof that the prosecution must proffer at the time of conviction are different. See infra Point I.B.1. Thus, there is no "clear statutory command" that a New York conviction for criminal sale of marihuana in the fourth degree – even if preceded by a prior such conviction – be automatically deemed to be the equivalent of a federal recidivist possession felony under the Controlled Substances Act or otherwise counterintuitively included within a "trafficking" label. See infra Point I.B.2.[1]

B. Under the strict federal felony approach adopted in Lopez, a second or subsequent state possession offense cannot be converted into the equivalent of a recidivist possession felony under federal law and therefore into an aggravated felony where notice and proof requirements were not met in the criminal proceeding.

In Lopez, the Supreme Court applied a strict federal felony approach to determine whether a state offense corresponds to a felony under the Controlled Substances Act such as to allow it to be drug trafficking aggravated felony. In adopting this approach, the Supreme Court rejected a broader inquiry into what charges a federal prosecutor could have brought against the defendant based on the underlying facts of the case, and instead focused on the defendant's actual state conviction. This approach is consistent with Second Circuit case law, which adopts a categorical approach in determining whether an offense is an aggravated felony. Applying the Lopez analysis to the offense at issue, the nontrafficking conviction in this case does not correspond with a federal felony such as to allow it to be considered a drug trafficking aggravated felony. A federal felony conviction for recidivist possession requires notice and an opportunity to challenge the fact, finality, and validity of a prior conviction – none of which was at issue in the criminal proceedings in this case. Other courts that have examined this issue under the federal felony approach adopted in Lopez have also rejected arguments automatically

[1] Indeed, the inclusion of this offense within the "aggravated felony" label also contradicts plain and ordinary meaning of the term "aggravated felony" because the offense is a state law misdemeanor. See NYSDA Amicus Brief at 8-13 (explaining that the ordinary and natural meaning of the term "aggravated felony" includes only felonies, as confirmed by statutory and legislative history). The holding in Lopez did not resolve the issue of whether a state misdemeanor drug offense could ever be considered an "aggravated felony," since the petitioner's conviction in that case was a state felony. See Lopez, 127 S. Ct. at 628 (noting that petitioner Jose Lopez was convicted of aiding and abetting another person's possession of cocaine, see S.D. Codified Laws §§ 22-42-5, 22-6-1, 22-3-3, and was sentenced to five years' imprisonment).

equating any second or subsequent possession offense with federal recidivist possession. A second or subsequent state possession offense simply cannot be converted into the equivalent of recidivist possession where notice and proof requirements were not met in the criminal proceeding.

1. Under Lopez and Second Circuit case law, courts must focus on the actual state conviction, and not on facts outside the record of conviction, to determine whether the offense strictly corresponds to a federal felony under the Controlled Substances Act.

In Lopez, the Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." Lopez, 127 S. Ct. at 633 (emphasis added). Thus, the relevant inquiry under Lopez is not to determine whether some federal felony charge could have hypothetically been brought against the defendant based on the facts in his or her case. The relevant inquiry under Lopez is to determine, through a strict comparison of the state offense with federal offenses under the Controlled Substances Act, how federal law would punish the offense as delineated in the actual state conviction. See id.[2]

The Supreme Court makes this distinction between actually determined guilt and hypothetical liability clear in its discussion of possession and possession with intent to distribute. The Supreme Court observed that "some States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor whatever the amount (but leaves it open to charge the felony possession with intent to distribute when the amount is large)." Id. at 632. A defendant with a large quantity of drugs might, for example, be charged with a state felony for simple possession (a misdemeanor under federal law) or possession with intent to distribute (a felony under federal law). However, what matters for purposes of the Supreme Court's strict federal felony analysis is ultimately the actual state conviction. In other words, the fact that a state simple possession offense could have been charged as possession with intent to distribute will not convert the simple possession conviction into an aggravated felony. The Supreme Court recognized this point, noting that, under its analysis, a defendant "convicted by a State possessing large quantities of drugs would escape the aggravated felony designation" since federal law punishes possession with intent to distribute, not simple possession, as a felony. Id. While recognizing the anomalies in which its strict federal felony approach might result given different state

[2] The reasoning in Lopez thoroughly undermines any argument that the phrase "felony punishable under the Controlled Substances Act" permits a court to consider whether the offense is hypothetically punishable as a federal felony based on facts outside the record of conviction. Rather, the Supreme Court's reasoning clarifies that the focus of the analysis must be on whether the actual statute offense at issue is punishable as a federal felony, i.e., how federal law treats the offense as it was actually charged and decided in the record of conviction. See Lopez, 127 S. Ct. at 633.

practices, the Supreme Court found such anomalies preferable to the many others that would result if a more expansive approach was taken. Id.[3]

The Lopez approach is fully consistent with the "categorical approach" adopted by the Second Circuit to determine generally if an offense constitutes an aggravated felony. Under the categorical approach, courts "look to the generic elements of the statute offense" to determine if a conviction meets the aggravated felony definition. Jobson v. Ashcroft, 326 F.3d 367, 371-72 (2d Cir. 2003). "Only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant." Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001). Where a statutory offense is divisible (i.e., covering some conduct that falls within the aggravated felony label and some that does not), courts may examine the record of conviction for the limited purpose of determining which part of the statute applies to the individual's conviction. See Dickson v. Ashcroft, 346 F.3d 44, 48-49 (2d Cir. 2003). However, courts "cannot go behind the offense as it was charged to reach [their] own determination as to whether the underlying facts amount to one of the enumerated crimes." Sui v. INS, 250 F.3d 105, 117-18 (2d Cir. 2001) (citations omitted).

Thus, under both Lopez and Second Circuit case law on the categorical approach, courts may not look behind a person's conviction to consider whether a federal prosecutor could have charged him or her with a federal felony based on facts not pled to or proven in the criminal case. The relevant inquiry is focused not on what a prosecutor could have charged, but on the actual state conviction. As explained in Point I.B.2 below, comparing the conviction at issue in this case to federal recidivist possession demonstrates that the two do not correspond. Thus, the nontrafficking offense at issue cannot be considered an aggravated felony because the strict

[3] An example based on New York law further illustrates the strictness of the Supreme Court's approach: Defendant X is arrested while possessing crack cocaine. The state is deciding whether to charge him with simple possession under NYPL 220.09(4) (possession of 1 gram or more of a stimulant) or possession with intent to sell under NYPL 220.16(2) (possession of 1 gram or more of a stimulant with intent to sell). The state decides to charge him with simple possession, and Defendant X is convicted. The record of conviction contains no further information about the offense or the specific amount of drugs involved. Under the strict federal felony approach in Lopez, Defendant X's conviction is not an aggravated felony. As Lopez makes clear, it does not matter that, hypothetically, the state could have charged Defendant X with possession with intent to sell under NYPL 220.16(2). Nor would it matter if something outside the record of conviction indicates that Defendant X may have been in possession of more than 5 grams of crack cocaine (possession of more than 5 grams of crack cocaine being the only circumstance in which first-time simple possession of crack cocaine would be treated as a felony under federal law). What matters, for the purpose of the Lopez analysis, is what Defendant X's offense actually proscribes – and his offense proscribes the possession of 1 gram or more of a stimulant. Since nothing in his record of conviction specifies more details, his conviction would be treated as simple misdemeanor possession under federal law. Thus, Defendant X would not be designated as an aggravated felon. Contrary to the government's position in this case, a hypothetical or theoretical inquiry into what prosecutors might have charged has no place in the Supreme Court's analysis.

requirements of 21 U.S.C. §§ 844(a) and 851 have not been met and have not been made part of the record of conviction.[4]

2. A drug possession offense may be prosecuted as a recidivist felony under federal law only where the prosecution has filed the proper information and the court has provided an opportunity for the defendant to challenge the fact, finality, and validity of the prior drug conviction – requirements not met in the criminal proceedings at issue here.

Several strict requirements must be met in order for an offense to be punished as a felony under the recidivist possession provisions of 21 U.S.C. §§ 844(a) and 851. First, the prosecutor must file an information to the court and serve a copy of such information to the defendant before he or she enters a guilty plea or trial commences. 21 U.S.C. § 851(a). This information must state the prior convictions to be relied upon, and thus provide the defendant notice of the potential increased punishment. Id. Upon receiving the information, the defendant has a statutory right to challenge the prior conviction. 21 U.S.C. § 851(c). Specifically, a defendant may deny any allegation of prior conviction or challenge the conviction as invalid by filing a written response to the prosecutor's information. Id. The court must then hold a hearing on the

[4] Although other circuit courts that have addressed this issue in the immigration context have found that a second or subsequent possession offense does not constitute an aggravated felony, see infra Point I.B.3, the Second Circuit has thus far declined to address this issue in the immigration context. In Durant v. INS, the Court initially issued a short opinion stating, with little analysis, that the petitioner's second possession conviction constituted an aggravated felony, but later amended the decision by eliminating the discussion of the aggravated felony issue altogether and noting the lacking of briefing on the "complex issue." See Durant v. INS, 393 F.3d 113, 115 (2d Cir. 2004), amended by Durant v. INS, Docket No. 99-4096-ag, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. December 16, 2004) ("We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . . Accordingly, we do not address [the issue]"). In United States v. Simpson, a sentencing case that also lacked full briefing on the multiple possession issue, the Court issued an opinion holding that the defendant's subsequent possession conviction constituted an aggravated felony, but added a footnote limiting its holding to the sentencing context. See United States v. Simpson, 319 F.3d 81, 86 n.7 (2d Cir. 2002) (as amended April 2, 2003) ("We offer no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than the Guidelines."). In Vacchio v. Ashcroft, a case arising under the Equal Access to Justice Act ("EAJA"), the Court concluded that the government's argument that a second possession conviction constituted an aggravated felony – although rejected by the immigration judge and open to contention – was "substantially justified" under preexisting case law for purposes of defeating the petitioner's EAJA claim. Vacchio v. Ashcroft, 404 F.3d 663, 677 (2d Cir. 2005) (as amended May 11, 2005) (citing Simpson, 391 F.3d at 85). Notably, the Court in Vacchio did not treat Simpson as controlling law in the immigration context. See id. In any event, these decisions were issued without the benefit of significant briefing or argumentation on the multiple possession issue and without Supreme Court guidance and were carefully tailored not to decide the issue in the immigration context. Lopez now clarifies the proper approach to analyzing this issue. Its reasoning controls the analysis in the case at hand.

issues raised by the defendant – a hearing in which the government has the burden of proof beyond a reasonable doubt on any issue of fact. 21 U.S.C. § 851(c)(1). These requirements and their consequences must be explained to the defendant by the court. 21 U.S.C. § 851(b).

These requirements for a conviction under the recidivist possession provisions of the Controlled Substances Act are meaningful and significant. By including the requirements, Congress intended to punish as a felony only those offenses in which, along with notice and proof of the elements of the possession offense, there is also notice and proof of a prior conviction that can withstand collateral attack. Congress enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, §§ 1101(b)(4)(A), 1105(a), 84 Stat. 1292, 1295. Before this law, a prior conviction typically resulted in mandatory sentencing enhancements, with no discretion given to the prosecutor even in many low-level cases. See United States v. Dodson, 288 F.3d 153, 159 (5th Cir. 2002) (discussing the legislative history of § 851). By enacting § 851 as part of this law, Congress intended "to make more flexible the penalty structure for drug offenses. The purpose was to eliminate the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." United States v. Noland, 495 F.2d 529, 533 (5th Cir. 1974) (internal quotation marks omitted); see also Report of House Comm. on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 ("The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences."). Thus, prosecutors were given the option not to seek a sentencing enhancement in low-level cases. Furthermore, for cases where prosecutors did seek to use a prior conviction to enhance a sentence, Congress made the requirements of 21 U.S.C. § 851 strict and mandatory. See Noland, 495 F.2d at 533 (discussing how Congress used mandatory language in the text of § 851).

Given this historical context, the Supreme Court has repeatedly recognized the importance of strictly adhering to the requirements of 21 U.S.C. § 851. In United States v. LaBonte, 520 U.S. 751 (1997), the Supreme Court considered the appropriate sentencing instrument for recidivist offenders who may receive a higher sentence under either a statutory sentence enhancement or under the "career offender" provisions of the United States Sentencing Commission's Sentencing Guidelines. In deciding that the Sentencing Commission had improperly favored the Sentencing Guidelines' "career offender" sentencing enhancements over the statutory enhancements, the Supreme Court discussed the requirements for applying a statutory sentencing enhancement under § 851(a)(1):

> The imposition of [a statutory] enhanced penalty is not automatic. Such a penalty may not be imposed unless the Government files an information notifying the defendant in advance of trial (or prior to the acceptance of a plea) that it will rely

> on that defendant's prior convictions to seek a penalty enhancement. 21 U.S.C. § 851(a)(1).

Id. at 754 (emphasis added). The Court also warned against reading § 851 in such a way as to "[subsume] within a single category both defendants who have received notice under § 851(a)(1) and those who have not," because the enhanced maximum term authorized under the statute applies to defendants who receive notice under § 851 while the regular maximum term applies to defendants who do not receive the notice. Id. at 759-60. Later, in Price v. United States, 537 U.S. 1152 (2003), the Supreme Court addressed § 851 specifically in the context of the recidivist enhancement in § 844(a), holding that the petitioner's 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the Government's failure to file a notice of enhancement under § 851(a), and remanding a Fifth Circuit case with a contrary holding to be reconsidered in light of LaBonte. In Price, the Solicitor General's brief acknowledged that the petitioner's drug offense could not be treated as a felony given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. Id.[5]

Thus, treating any second or subsequent possession offense as a recidivist possession conviction under 21 U.S.C. §§ 844(a) and 851 flouts Congress's chosen statutory scheme to

[5] Circuit courts have similarly demanded strict adherence to the requirements of § 851 in a variety of contexts. See, e.g., United States v. Flowers, 464 F.3d 1127, 1131 (10th Cir. 2006) ("We have . . . always required strict compliance with § 851. The language of the statute . . . does impose strict requirements on the government before the government can seek an increase in the statutory mandatory maximum or minimum sentence. That Congress intended § 851 to provide a measure of protection to defendants from the use of prior convictions to change the statutory sentences for crimes also argues in favor of strictly enforcing § 851 against the government." (internal quotation marks, brackets and citations omitted)); United States v. Martinez, 253 F.3d 251, 255 n.4 (6th Cir. 2001) (stating that the government could not rely upon defendant's prior conviction to enhance his sentence where it failed to file prior conviction information under § 851); United States v. Green, 175 F.3d 822, 836 (10th Cir. 1999) (vacating enhanced sentence where government failed to meet its burden to prove the prior convictions pursuant to § 851, where convictions were under a different name); United States v. Sanchez, 138 F.3d 1410, 1416 (11th Cir. 1998) (vacating sentence where government failed to file proper information and court did not hold a hearing to address defendant's claims that his prior convictions were invalid under § 851, noting that "[t]he language of the statute is mandatory, requiring strict compliance"); United States v. Ruiz-Castro, 92 F.3d 1519, 1536 (10th Cir. 1996) (remanding case for resentencing where it was unclear whether the defendant fully "appreciated his ability to challenge the prior conviction for sentencing purposes" under § 851); United States v. Levay, 76 F.3d 671, 674 (5th Cir. 1996) (holding that, because government withdrew its notice of intent to rely on prior convictions under § 851, the district court improperly considered those prior convictions in sentencing); United States v. Johnson, 944 F.2d 396, 407 (8th Cir. 1991) (vacating sentence where government did not file timely information regarding its intent to rely on prior convictions under § 851, noting that the government must strictly adhere to § 851 to "allow[] the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict").

punish as felonies only those offenses where the strict requirements are met. Stated another way, Congress's "clear statutory command" explicitly requires that, for a defendant to be convicted of felony recidivist possession, the prosecutor must provide an information about the prior conviction and the defendant must have an opportunity to attack the fact, finality, and validity of that conviction. Therefore, a recidivist possession conviction cannot be equated under Lopez to a conviction for simple possession where the criminal court never considered or adjudicated the existence, finality or validity of prior convictions.

Such is the case here. The petitioner's conviction for criminal sale of marihuana in the 4th degree is not punishable as a felony under the Controlled Substances Act. A conviction for criminal sale of marihuana in the 4th degree, even if it is the second or third such conviction of the defendant, still only punishes the giving or offering a small amount of marihuana to another person for no remuneration, see NYPL § 221.40, which is an offense punishable as a misdemeanor under federal law, see 21 U.S.C. § 841(b)(4). No inquiry must be made into the existence, finality or validity of prior convictions in order for an individual to be guilty of the state law offense. In this case, no such requirements are evinced in the record of conviction. By contrast, as described above, a conviction for felony recidivist possession under federal law requires proof of a previous final conviction and an opportunity for the defendant to challenge its validity. See 21 U.S.C. §§ 844(a) and 851.

Thus, there is no argument, post-Lopez, that the conviction at issue in this case can be treated as the equivalent of federal recidivist possession under the strict requirements of the Controlled Substances Act. After all, if a second or subsequent state possession offense can be considered sufficiently analogous to recidivist possession under the Controlled Substances Act to constitute an aggravated felony despite the lack of proof of a prior conviction, then a second or subsequent federal possession offense without such proof could also be considered an aggravated felony – despite explicitly not being a felony under federal law. Similarly, in those states that may have a recidivist possession enhancement statute that corresponds with the federal recidivist enhancement, then under the government's argument, a second or subsequent state possession offense could be considered an aggravated felony even when state prosecutors did not obtain a conviction under that state's recidivist possession provision.[6] Such results would undermine Congress's clear intent to place strict requirements on what offenses may be deemed recidivist felonies under the Controlled Substances Act. Comparing the state conviction at issue to the federal recidivist possession felony under Lopez, the conviction cannot be deemed a drug trafficking aggravated felony.

3. Other circuits have found that second or subsequent nontrafficking offenses are not converted into drug trafficking aggravated felonies simply because of facts outside the record of conviction regarding a prior drug conviction.

The First and Third Circuits, in following an approach like the federal felony approach later adopted by the Supreme Court in Lopez, have both rejected arguments that a second or

[6] Some states have recidivist enhancement statutes, although they may or may not correspond to the strict requirements of the federal felony recidivist enhancement. See, e.g., Mass. Gen. Laws ch. 94C, § 34, ch. 278, § 11A.

subsequent possession offense could be treated as a federal recidivist possession felony in the absence of the federal law requirements for such convictions. See Berhe, 464 F.3d at 85-86; Steele, 236 F.3d at 137-38. In Steele, the Third Circuit held that the petitioner's subsequent conviction for criminal sale of marihuana in the 4th degree under NYPL 221.40 – the same conviction at issue in this case – was not an aggravated felony where the federal recidivist possession felony requirements were not met:

> [T]he distribution of 30 grams or less of marijuana without remuneration is not inherently a felony under federal law. If a United States Attorney wants a felony conviction, he or she must file an information under 21 U.S.C. § 851 alleging, and subsequently prove, that the defendant has been previously convicted of a drug offense at the time of the offense being prosecuted. . . . [T]he problem is that Steele's "one time loser" status was never litigated as a part of a criminal proceeding. That status was not an element of the crime charged in the second misdemeanor proceeding against him. As a result, the record evidences no judicial determination that that status existed at the relevant time. For all that the record before the immigration judge reveals, the initial conviction may have been constitutionally impaired. . . . [T]he record simply does not demonstrate that the prior conviction was at issue.

Steele, 236 F.3d at 137-38 (citations omitted). In so holding, the Third Circuit emphasized that the inquiry must focus on an analysis of the actual state conviction, and not on facts outside the record of conviction:

> The [Government] understandably stresses that Steele admitted to the immigration judge that there were three outstanding state misdemeanor convictions. It suggests that on this basis the immigration judge was entitled to conclude that Steele was a "one time loser" when he committed his second offense. Congress, however, has not left it up to the immigration judge to determine whether Steele committed a felony. As we stated at the outset of this portion of our analysis, the aggravated felony disability under the Act applies only if there has been a conviction of a felony. It is one thing to accept, as we do arguendo, that the conviction may be of a hypothetical felony conviction; it would be entirely another simply to ignore the requirement that there be a conviction.

Id. at 138. Similarly, in Berhe, the First Circuit also applied a strict federal felony approach, focusing on the underlying conviction and not the facts outside the record of conviction:

> Because Berhe's 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony. . . . When the statute on which the underlying conviction rests necessarily involves all of the elements enumerated in one of the INA's definitions of aggravated felony, proof of the fact of conviction suffices to discharge the government's burden. Where, however, the underlying statute sweeps more broadly (i.e., encompasses crimes that are not necessarily aggravated felonies under the INA), the government . . . must demonstrate, by

> reference only to facts that can be mined from the record of conviction, that the putative predicate offense constitutes a crime designated as an aggravated felony in the INA.
>
> As noted above, the underlying state statute here [possession of a controlled substance under Massachusetts law] encompasses crimes that ordinarily would not constitute felonies under either state or federal law. Therefore, we must look to the record of conviction of the alleged aggravated felony to determine whether the government met its burden of proving that Berhe had a prior conviction for a drug offense. . . . Because the record of conviction here contains no reference to Berhe's prior conviction, or to any other factor that would hypothetically convert his 2003 state misdemeanor conviction into a felony under federal law, the Board erred by concluding that his 2003 conviction was an "aggravated felony" under 8 U.S.C. § 1101(a)(43).

Berhe, 464 F.3d at 85-86 (internal quotation marks omitted). These cases confirm that applying the federal felony approach, as adopted in Lopez, to the issue of multiple possession or nontrafficking offenses leads to the sole conclusion that the conviction at issue here cannot be considered an aggravated felony where the federal recidivist possession requirements were not met in the criminal proceeding.

Moreover, the holdings of the First and Third Circuit are part of the general trend among the circuits pre-Lopez. While the Fifth Circuit had previously noted that a state possession offense could be considered an aggravated felony when there is a prior conviction, without addressing the specific requirements of 21 U.S.C. § 844(a) and 851, see United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005) (presenting an alternative basis for affirming the district court's decision in the sentencing context), it has more recently joined the Sixth Circuit in holding that a state offense may not be treated as a recidivist possession felony under federal law if the second offense occurs before the prior conviction becomes final. See Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006) (acknowledging the finality requirement of § 844(a)); see also United Staes v. Palacios-Suarez, 418 F.3d 692, 700 (6th Cir. 2005) (same). The Ninth Circuit has held that only the statutory offense itself, without regard to recidivist sentencing enhancements, can be considered in determining whether an offense is an aggravated felony, and has also acknowledged the finality requirement of § 844(a). See United States v. Ballesteros-Ruiz, 319 F.3d 1101, 1104 (9th Cir. 2003). Thus, even pre-Lopez, courts applied a strict approach to determining whether a state offense is a felony under federal law and therefore an aggravated felony. Post-Lopez, it is even more clear that a second or subsequent possession or other nontrafficking offense cannot be considered an aggravated felony where the federal recidivist possession requirements were not met in the criminal proceeding.

II. THE RARITY OF PROSECUTIONS OF SECOND OR SUBSEQUENT DRUG POSSESSION AS FELONY RECIDIVIST POSSESSION IN ACTUAL FEDERAL CRIMINAL PRACTICE CONFIRMS THAT STATE SECOND POSSESSION CONVICTIONS SHOULD NOT AUTOMATICALLY BE DEEMED DRUG TRAFFICKING AGGRAVATED FELONIES.

The conclusion that a second or subsequent state drug possession offense may not automatically be deemed an aggravated felony is further supported by the fact that most federal second or subsequent drug possession offenses are not actually prosecuted as recidivist felonies under federal law in the absence of other more serious charges. Indeed, the government's position in this case that any state second or subsequent possession offense may be deemed an aggravated felony simply because of facts outside the record regarding a prior drug conviction would necessarily lead to a conclusion that any federal second or subsequent offense also must be deemed an aggravated felony even if the offense was not actually prosecuted as a felony by federal prosecutors, a result that clearly does not comport with Lopez.

In actual federal practice, the recidivist enhancement in §§ 844(a) and 851 is rarely used to elevate a defendant with only multiple misdemeanor possession convictions on his or her record to felony recidivist status. We are aware of no such cases and have found none in our research. In our experience, to the extent that recidivist enhancements in the Controlled Substances Act based on prior convictions are used, they are applied to cases where the prior drug conviction is already a federal felony, 21 U.S.C. § 841(b) (which would be inapplicable to the case at hand because federal felony drug convictions would necessarily be considered aggravated felonies) or where other more serious, non-drug-related charges are also involved. Given the infrequency with which the recidivist enhancement is used in the context of federal defendants whose prior convictions are only drug possession convictions, it is inappropriate to automatically treat any second or subsequent misdemeanor conviction as equivalent to recidivist possession.

While there are many individuals who have multiple misdemeanor drug possession convictions, there are few individuals whose simple possession convictions have resulted in a felony recidivist designation. There are several different explanations for this – the first and most obvious being that the prosecutor may not wish to undertake the specific requirements of 21 U.S.C. § 851 in misdemeanor cases. As the legislative history discussed above in Point I.B.2 makes clear, prosecutors do not often wish to seek serious felony enhancements where the underlying crimes are minor. Moreover, the validity of the prior misdemeanor conviction(s) may be questionable, and thus is a barrier to meeting the strict requirements of § 851. Because of the summary fashion in which many of these minor possession convictions are charged and prosecuted, sometimes without defense counsel or even a court appearance, many would be vulnerable to collateral attack if the government sought to use them as a basis for a recidivist enhancement charge. See infra Point III (discussing why the validity of prior convictions may be open to question in many cases).

Furthermore, a prosecutor may not wish to go through the process of filing an information in the case. If a prosecutor chooses to charge a person in possession of drugs with a class A misdemeanor instead of a recidivist felony, he or she has the freedom to charge the

person by complaint rather than indictment or information. See Fed. R. Crim. P. 58(b)(1). If the prosecutor chooses to charge the person with a petty offense, then a violation notice, or federal ticket, issued by the arresting police officer would suffice. Id. In cases involving low-level offenses, prosecutors often prefer these methods to the additional hurdles that a felony prosecution would entail.

Indeed, in many instances, these minor cases arise in the federal system because the defendant violated a particular federal regulation. In such cases, these individuals are sometimes charged under the federal regulation rather than the Controlled Substances Act. For example, a person arrested on federal national park property for simple marijuana possession may be charged under either the Controlled Substances Act or under 36 C.F.R. § 2.35(b)(2), which is a class B misdemeanor pursuant to 36 C.F.R. § 1.3(a). A person using a drug on Veterans Affairs property is likely to be charged under 38 C.F.R. § 1.218(b)(17) and (18), both of which are also class B misdemeanors pursuant to 38 C.F.R. § 1.1218(b). Class B misdemeanors are petty offenses that are often treated so summarily that the charge is unlikely to be changed from the Codes of Federal Regulations petty offense to a Controlled Substances Act misdemeanor for the purposes of seeking the recidivist enhancement.

This practical reality is important because it provides a key context for assessing the scope of the Controlled Substances Act in this case. For the many reasons explained, federal misdemeanants are seldom charged with recidivist possession. Yet the government's position in this case is that a state law misdemeanant who was not given notice or an opportunity to challenge the validity of his or her prior conviction(s) should be treated as a recidivist felon under the Controlled Substances Act. This argument places thousands of individuals with state possession offenses – often misdemeanors – at risk of being treated as drug trafficking aggravated felons based on provisions rarely used in the federal context and not at all applied in the individuals' state cases. Furthermore, if courts and the immigration agency may assume that such individuals would have had the recidivist enhancement applied to them regardless of what was actually charged and proven by the prosecuting attorney in the criminal proceeding, then they may make such an assumption with respect to any second or subsequent possession offense – even a federal misdemeanor – where the prosecution has considered and rejected seeking a felony recidivist enhancement. Such authority would unfairly punish such a federal misdemeanant and undermine the decision of the federal prosecutor not to pursue the recidivist enhancement. The Supreme Court recognized the integral role prosecutorial discretion plays in this context in LaBonte:

> Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against such a criminal suspect. . . . Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice [under § 851(a)(1)] is a foreseeable – but hardly improper – consequence of the statutory notice requirement.

LaBonte, 520 U.S. at 761-62. As discussed above in Point I.B.2, Congress enacted 21 U.S.C. § 851 specifically to increase prosecutorial flexibility in response to the overly harsh consequences

that flowed from how the sentencing system previously treated prior convictions. This practical context strongly cautions against reading the Controlled Substances Act in such a broad and over-expansive way that it would automatically turn individuals who would not be charged and convicted of felonies under federal law into aggravated felons.

III. IN CASES WHERE THE DRUG CONVICTION AT ISSUE AND THE PRIOR CONVICTION ARE MISDEMEANORS OR LESS, THE SUMMARY PROCESSING AND POSSIBLE INVALIDITY OF SUCH CONVICTIONS ARE FURTHER REASONS TO REJECT TREATING THE SECOND OFFENSE AS THE AUTOMATIC EQUIVALENT OF A FEDERAL RECIVIDIST FELONY.

Treating a nontrafficking conviction as the equivalent of felony recidivist possession – without the requirements of notice and an opportunity to challenge the fact, finality, and validity of the prior convictions – is particularly problematic where the conviction at issue, as well as the prior convictions, were prosecuted as misdemeanors or even lesser offenses under state law. This is because such prosecutions involve summary procedures that not only raise questions regarding the fairness of treating the state conviction at issue as the equivalent of a federal felony, but also raise heightened concerns regarding the potential invalidity of the prior conviction(s) that the petitioner never had the opportunity to challenge, as he or she would have had under federal law.

Misdemeanor drug convictions, particularly petty offenses, are charged and prosecuted in a summary fashion in both the state and federal systems. Under federal law, for example, petty misdemeanor drug charges can be initiated and resolved through a ticket mechanism. Attached to this letter is a copy of a sample federal ticket, as provided by the Central Violations Bureau, a division of the Administrative Office of the U.S. Courts. See Appendix A. In what looks very similar to a standard traffic ticket, the charge is written in the space provided and one of two boxes is checked, either requiring the person to appear in court or with the option to pay a fine instead. The ticket does not apprise the recipient of the elements of the charge against them, of their right to a trial, or of the effect of paying the fine. See Mary Warner, The Trials and Tribulations of Petty Offenses in the Federal Courts, 79 N.Y.U. L. REV. 2417, 2417 (2004). Most people simply return the ticket with a check for the fine, not knowing that the act is considered "collateral forfeiture" that, depending on the jurisdiction, may be considered an admission of guilt to a federal crime. Id. at 2426; see also Dean v. United States, 418 F. Supp. 2d 149 (E.D.N.Y. 2006) (holding that a conviction obtained through a federal ticket was not valid where petitioner was not aware that his collateral forfeiture constituted a guilty plea).

The processing of misdemeanor or lesser cases in New York State presents similar concerns. As discussed in the Background section above, there is a high volume of misdemeanor cases in New York State. The cases are processed quickly, and go through the system without many of the procedural safeguards accorded to felony charges. Given this context, many defendants with misdemeanor charges (or even lesser charges, such as violations under New York law) may not be entering a knowing and voluntary plea, or may be suffering from procedural deficiencies that would, upon challenge, invalidate their convictions. See supra Background.

For purposes of the analysis in this case, the summary manner in which many misdemeanor and lesser convictions are attained matters in two ways. First, the deficiencies described may be present in the proceedings of a defendant whose current misdemeanor or lesser offense will later be treated a recidivist felony for immigration purposes, but without the attendant protections of a felony charge. Even assuming that a misdemeanor or lesser offense can even meet the definition of an aggravated felony for immigration purposes, see NYSDA Amicus Brief at 9-13 (arguing that only felonies can constitute "aggravated felonies"), treating a misdemeanor or lesser offense as a felony is still inherently problematic, as the Third Circuit has explained:

> The fact that this hypothetical offense approach imposes such grave consequences on factual determinations made, or pleas entered, in misdemeanor proceedings is one of its more troubling aspects. Misdemeanor charges are frequently not addressed by a defendant with the same care and caution as a felony indictment with its more serious, immediate consequences. This concern counsels, at a minimum, that we insist on sufficient formality in the misdemeanor proceeding to assure that each and every element of the hypothetical federal felony is focused on and specifically addressed in that proceeding.

Steele, 236 F.3d at 137. Thus, for cases like the petitioner's and those of other individuals whose conviction at issue is a state misdemeanor or non-criminal violation, see supra Background, it is troubling the government seeks mandatory deportation (due to the aggravated felony designation) based on criminal dispositions that were obtained through a process that bears little resemblance to how a felony, let alone a federal recidivist felony, would be obtained.

Second, given the deficiencies in misdemeanor or lesser proceedings generally, a defendant who is being treated as a recidivist felon based on a prior misdemeanor or lesser conviction may well have a claim that the prior conviction was invalid. However, in cases such as the petitioner's and possibly those of others to be considered by this Court, see supra Background, no notice of the consequences of that prior conviction or an opportunity for a hearing on those claims of invalidity under 21 U.S.C. § 851 was available. Thus, adopting the government's approach runs the risk of treating a subsequent conviction as a recidivist felony based on a potentially invalid prior misdemeanor or lesser conviction. Such a defendant is arguably made worse off than if he or she had been actually charged and prosecuted for felony recidivism – at least in the felony context, the defendant would have had both the benefit of felony procedural protections in that proceeding and an opportunity to challenge the fact, finality, and validity of any prior misdemeanor or lesser offenses. Instead, petitioners like Mr. Martinez, Mr. Minto, Mr. Powell, and Mr. Stewart are facing the vast, negative consequences of the "aggravated felony" designation based on proceedings in which neither the conviction at issue nor the prior conviction relied upon had those heightened protections. See supra Background. Indeed, in the case of Mr. Minto, he is facing mandatory deportation based on dispositions that are not even considered "crimes" under state law. Id. This context thus provides further reason to reject an expansive reading of the felony recidivism provisions at issue here.

IV. SHOULD THE COURT FIND THAT THE STATUTE IS NOT CLEAR ABOUT WHAT STATE POSSESSION OFFENSES MAY BE DEEMED AGGRAVATED FELONIES, THE COURT SHOULD APPLY THE RULE OF LENITY TO FIND THAT SUCH OFFENSES ARE NOT AGGRAVATED FELONIES WHERE THE REQUIREMENTS FOR STATE CONVICTION DO NOT CORRESPOND TO THE REQUIREMENTS FOR A FEDERAL FELONY CONVICTION.

As explained above, the petitioner's actual conviction under NYPL 221.40, regardless of any facts outside the record of conviction regarding a prior conviction, proscribes conduct that the Controlled Substances Act punishes only as misdemeanor possession. Such a conviction is not an aggravated felony under the strict federal felony approach adopted in Lopez. Insofar as there is any lingering ambiguity over whether such a conviction meets the definition of a drug trafficking aggravated felony as outlined in Lopez, any such ambiguity must be resolved in favor of the immigrant. See Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (noting that, under the rule of lenity, ambiguities in criminal and deportation statutes must be construed in favor of the immigrant); INS v. St. Cyr, 533 U.S. 289, 320 (2001) (same); INS v. Errico, 385 U.S. 214, 225 (1966) (same); see also Chrzanoski v. Ashcroft, 327 F.3d 188, 197 (2d Cir. 2003) (applying rule of lenity to find a state criminal conviction not to be an aggravated felony). Notably, the Third Circuit, in assessing whether a subsequent conviction under NYPL 221.40 was sufficiently analogous to a felony recidivist possession conviction under the Controlled Substances Act, found that "the only alternative . . . consistent with the rule of lenity" was to treat the conviction as a misdemeanor under federal law. Steele, 236 F.3d at 137. Given the drastic consequences that result for the petitioner and others like him under a different reading, a second or subsequent possession or other nontrafficking conviction, without more, should not be considered a drug trafficking aggravated felony. See NYSDA Amicus Brief at 21-26.

For the aforementioned reasons, amicus curiae respectfully requests that the Court hold that a second or subsequent possession or other nontrafficking offense is not an "illicit trafficking" aggravated felony, consistent with the reasoning in Lopez. Thank you for your consideration of this letter brief.

Respectfully submitted,

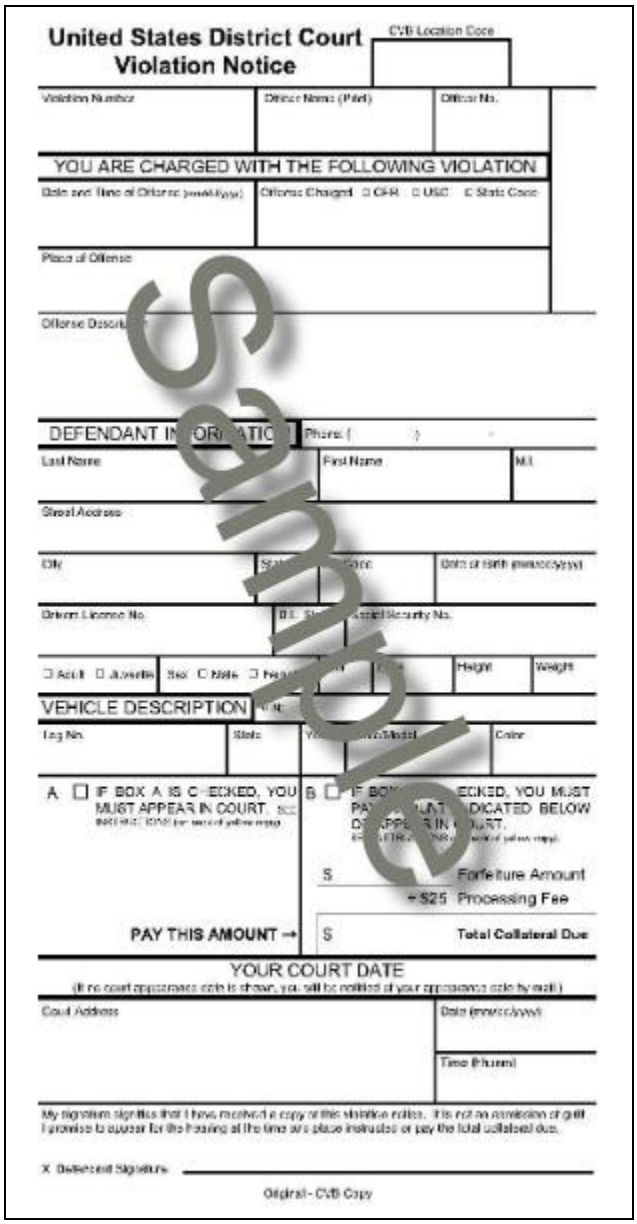
Nancy Morawetz
Mandy Hu
Carlin Yuen
Immigrant Rights Clinic
Washington Square Legal Services
Of Counsel

Manuel D. Vargas
Alina Das
Benita Jain
Marianne Yang
Immigrant Defense Project
New York State Defenders Association

cc: James P. Kennedy, Esq., AUSA
Matthew Guadagno, Esq., counsel for Mr. Martinez

APPENDIX A

Sample Federal Ticket, http://www.cvb.uscourts.gov/sample.html



United States District Court
Violation Notice

CVB Location Code

Violation Number | Officer Name (Print) | Officer No.

YOU ARE CHARGED WITH THE FOLLOWING VIOLATION

Date and Time of Offense (mm/dd/yy) | Offense Charged ☐ CFR ☐ USC ☐ State Code

Place of Offense

Offense Description

DEFENDANT INFORMATION | Phone: ( ) -

Last Name | First Name | M.I.

Street Address

City | State | Zone | Date of Birth (mm/dd/yy)

Driver License No. | D.L. State | Social Security No.

☐ Adult ☐ Juvenile | Sex: ☐ Male ☐ Female | Hair | Eyes | Height | Weight

VEHICLE DESCRIPTION | Veh. Id. No.

Reg No. | State | Year | Make/Model | Color

A. ☐ IF BOX A IS CHECKED, YOU MUST APPEAR IN COURT. SEE INSTRUCTIONS ON REVERSE (for use of yellow copy)

B. ☐ IF BOX B IS CHECKED, YOU MUST PAY THE AMOUNT INDICATED BELOW OR APPEAR IN COURT. SEE INSTRUCTIONS ON REVERSE (for use of yellow copy)

$ Forfeiture Amount

+ $25 Processing Fee

PAY THIS AMOUNT → $ Total Collateral Due

YOUR COURT DATE

(If no court appearance date is shown, you will be notified of your appearance date by mail.)

Court Address | Date (mm/dd/yyyy) | Time (Hours)

My signature signifies that I have received a copy of this violation notice. It is not an admission of guilt. I promise to appear for the hearing at the time and place instructed or pay the total collateral due.

X Defendant Signature

Original - CVB Copy